

**UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF VIRGINIA
 Alexandria Division**

In re:)	
)	
GABY A. TOUMA,)	Case No. 19-13288-BFK
)	Chapter 7
)	
Debtor.)	
<hr/>)	
SUSAN COURTNEY,)	Adversary Proceeding
)	No. 19-01123-BFK
Plaintiff,)	
)	
V.)	
)	
GABY A. TOUMA,)	
)	
Defendant.)	
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**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

This matter is before the Court on cross Motions for Summary Judgment. The Defendant filed his Motion on May 8, 2020. Docket Nos. 48, 49. The Plaintiff filed an Opposition. Docket No. 51. The Defendant filed a Reply Memorandum. Docket No. 79. The Plaintiff filed her Motion on May 22, 2020. Docket Nos. 55, 56 The Defendant filed an Opposition. Docket No. 79. The Plaintiff filed a Reply Memorandum. Docket No. 87. The Court heard the parties' arguments on June 2 and 16, 2020.

For the reasons stated below, the Court will grant the Plaintiff's Motion and will deny the Defendant's Motion. The Court will enter a Judgment declaring the Arbitration Award in this case to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Findings of Fact

The Court finds that the following facts are not genuinely in dispute.

A. The Plaintiff Purchases a Vehicle from GN Auto, LLC.

1. GN Auto, LC (“GN”) is a Virginia limited liability company licensed as an automobile dealer in Virginia. Docket No. 59, Breeden Decl., Ex. 18. The Defendant, Gaby Touma, was the Owner. *Id.* Mr. Touma also was identified as the Dealer Operator in GN’s Application for a license to operate as Motor Vehicle Dealer in Virginia. *Id.*¹

2. In May 2016, the Plaintiff, Susan Courtney, purchased a 2007 Jaguar XK automobile for \$12,781.00 from GN. Courtney Affidavit, Ex. 2.

3. Prior to purchasing the vehicle, the Plaintiff reviewed GN’s website, which appeared to promise an 84-month warranty on all vehicles. Docket No. 57, Courtney Decl., Ex. 1 (“All vehicles come with 84-month limited warranty at the listed price for your peace of mind.”)

4. When the Plaintiff purchased the vehicle, however, the Buyer’s Order stated that the vehicle was being sold “AS IS.” *Id.*, Ex. 2 (emphasis in original). Ms. Courtney also acknowledged receipt of a Buyer’s Guide that stated in all caps: “AS IS, NO WARRANTY.” *Id.*, Ex. 3.

5. Ms. Courtney began to experience problems with the car. When she returned to GN for repairs, she was told that GN would not honor any warranty on the vehicle. *Id.*, ¶ 4.

6. Ms. Courtney further claims that GN never titled the vehicle in her name, that the registration has now expired. *Id.*, ¶¶ 8,9.

7. The Plaintiff claims that she has incurred damages in the form of repair bills and the lost value of the vehicle, plus his attorney’s fees.

¹ Mr. Touma’s brother, Joe Touma, also worked at GN. The Court will refer to the Defendant, Gaby Touma, as “Mr. Touma” in these findings, unless indicated otherwise.

B. The Plaintiff Brings Suit Against GN and Mr. Touma.

8. Ms. Courtney filed a Complaint against GN and Mr. Touma in the Circuit Court of Fairfax County. *Courtney v. GN Auto, LLC, et al.*, Case No. 2016-12947 (Va. Cir. Ct. Nov. 4, 2016).

9. The Circuit Court referred the matter to arbitration at GN's request.

10. During the arbitration, the Arbitrator, Retired Circuit Court Judge Alfred Swersky, found the Defendants to be in default, owing to their failure to respond to discovery requests.

11. On October 4, 2017, the Arbitrator entered an Arbitration Award against the Defendants, jointly and severally, in the amounts of \$15,434.32 in actual damages, trebled to \$46,362.96 under the Virginia Consumer Protection Act (VCPA), \$25,000.00 in punitive damages and \$15,700.00 in attorney's fees. Docket No. 59, Breeden Decl., Ex. 11.

12. The Arbitration Award was rendered on the basis of "actual fraud" and violations of the VCPA. *Id.*

13. Ms. Courtney the moved to confirm the Arbitration Award in the Circuit Court. On February 15, 2018, Judge Schell of the Circuit Court ruled that he would confirm the Award against GN, but not against Mr. Touma. *Id.*, Ex. 13. Judge Schell held that: (a) Mr. Touma's Objections to the Award were timely filed because Mr. Touma was not represented by counsel in the case, and service of the Award on GN's counsel was not good service on Mr. Touma; and (c) Mr. Touma never personally signed an arbitration agreement, so the Award was void as to Mr. Touma. *Id.*

14. Ms. Courtney filed a petition for appeal with the Virginia Supreme Court, which granted the petition. On August 1, 2019, the Virginia Supreme Court reversed Judge Schell's

Order in an Unpublished Order, finding that: (a) Mr. Touma was in fact represented by counsel in the case; and (b) that, therefore, his Objections to Arbitration Award were untimely. *Id.*, Ex.

14. The Virginia Supreme Court remanded the case to the Circuit Court “for further proceedings consistent with this order.” *Id.*, Ex. 14, p. 5.

C. Mr. Touma Files a Bankruptcy Petition.

15. On October 3, 2019, Mr. Touma filed a Voluntary Petition under Chapter 7 with this Court. *In re Touma*, Case No. 19-13288-BFK (Bankr. E.D. Va. Oct. 3, 2019). On January 7, 2020, Mr. Touma received a discharge in his bankruptcy case, subject to determinations of the dischargeability of any debts for which creditors timely filed complaints under Bankruptcy Code Section 523. *Id.*, Docket No. 21.

16. On December 20, 2019, Ms. Courtney filed the Complaint in this case, requesting that this Court declare Mr. Touma’s debt to Mr. Fasusi to be non-dischargeable pursuant to 28 U.S.C. § 523. The Complaint included Counts under Sections 523(a)(2)(A) (actual fraud), (a)(4) (defalcation while acting in a fiduciary capacity) and (a)(6) (willful and malicious injury). Docket No. 1.²

17. After the Plaintiff filed an Amended Complaint, Mr. Touma filed a Motion to Dismiss under Bankruptcy Rule 7012. On March 25, 2020, the Court granted Mr. Touma’s Motion on the 523(a)(4) Count (defalcation while acting in a fiduciary capacity) and the 523(a)(6) Count (willful and malicious injury). Docket No. 38.

18. The Court denied the Motion to Dismiss on the 523(a)(2)(A) (actual fraud) Count, holding that the Plaintiff had made plausible allegations that that the Defendant “supervised, approved and maintained the content on GN Auto’s web site,” Docket No. 35, Am. Compl., ¶ 12,

² Another disappointed auto purchaser, John Fasusi, filed a similar Complaint. *Fasusi v. Touma*, Adv. Pro. 19-1122-BFK (Bankr. E.D. Va. Dec. 20, 2019).

19. Mr. Touma submitted an Affidavit in support of his Motion. Docket No. 49, Touma Aff., Ex. C. His Affidavit states that: (a) he never met, nor had any communication with Ms. Courtney; (b) he was not involved in the day-to-day operations of GN; (c) he was an absentee owner; (d) he did not supervise nor maintain GN's web site; (e) he did not make policy, or ratify any policy, for the dealership. *Id.*, Touma Aff., ¶¶ 5, 6, 8-13.

21. The Defendant served the Plaintiff with Interrogatories to determine the basis for the Plaintiff's allegations. In his Answers to Interrogatories in this action, Ms. Courtney provided no facts in support of her allegations. Rather, Ms. Courtney relied on Mr. Touma's duties as Dealer Manager for GN under Virginia Code Section 46.2-1500, as well as the legal argument that the Arbitration Award is entitled to collateral estoppel. Docket No. 49, Ex. A, Pl.'s Answers to Interrogatories, Nos. 1, 2, 5, 6, 7.

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Conclusions of Law

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference entered by the U.S. District Court for this District on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) (determinations as to the dischargeability of particular debts).

Summary judgment is appropriate where there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056. The moving party has the initial burden of showing that there are no material facts in dispute, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). When the moving party has met its initial burden, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

Whether a fact is material or not depends on the substantive law at issue in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* Summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp.*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

Section 523(a)(2)(A) excepts debts from the debtor’s discharge that were incurred by fraud. To prevail on a claim of actual fraud, the plaintiff “must prove four elements: (1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing

harm to the plaintiff; and (4) the plaintiff’s justifiable reliance on the misrepresentation.” *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 134 (4th Cir. 1999). Although promises to perform in the future generally cannot form the basis of a fraud claim, a claim for fraud can be stated where it is alleged that the defendant made a promise without the present intent to perform. *Structured Invs. Co. v. Dunlap (In re Dunlap)*, 458 B.R. 301, 333 (Bankr. E.D. Va. 2011); *Soheily v. Vuong (In re Vuong)*, 353 B.R. 860, 866 (Bankr. E.D. Va. 2006).

The Court finds that the Plaintiff has satisfied his burden on the issue of collateral estoppel. The Court, therefore, will grant the Plaintiff’s Motion and will deny the Defendant’s Motion.

I. The Issue of Collateral Estoppel.

The Plaintiff relies on the doctrine of collateral estoppel, arising out of the unconfirmed Arbitration Award. Whether or not a state court judgment is entitled to collateral estoppel depends on the law of the state rendering the judgment. 28 U.S.C. § 1738 (2018) (state court judgements entitled to the same preclusive effect that they would have in the state that rendered the judgment); *TKC Aerospace, Inc. v. Muhs (In re Muhs)*, 923 F.3d 377, 385 (4th Cir. 2019) (“When a federal court exercises diversity jurisdiction over a state law claim . . . the federal rule ‘is to apply ‘the law that would be applied by state courts in the State in which the federal diversity court sits’ as long as the state rule is not ‘incompatible with federal interests’”).

A. An Unconfirmed Arbitration Award is not Entitled to Collateral Estoppel in Virginia.

Whether or not an unconfirmed arbitration award can give rise to collateral estoppel is an issue that is undecided under Virginia law. *Waterford Marine Constr. v. North End 49ers Sandbridge Bulkhead Grps. A, B and C*, 468 S.E.2d 894, 902 (Va. 1996) (“[W]e will assume, without deciding, that an unconfirmed arbitration award is treated in the same manner as a confirmed award for purposes of res judicata analysis.”); *Am. Coll. of Dentists Found., Inc. v.*

The Plaintiff argues that the Virginia Supreme Court remanded the matter, and that and that all that was left to do was the “ministerial act” of entering a final judgment on remand. *See* Va. Code Ann. § 8.01-581.09 (West 2020) (“Upon application of a party any time after an award

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B. *The Issue of Privity.*

The Court finds that Mr. Touma was in privity with GN. Mr. Touma was GN's sole Owner and was its Dealer Operator. Further, Mr. Touma was directing the defense of the case with the attorneys for GN. The Virginia Supreme Court's Opinion noted that Mr. Touma communicated with the attorneys for GN by e-mail throughout the arbitration. Indeed, it was Mr. Touma's stated position that "he believed that all of his communications with the attorneys related to his role as owner of GN Auto." Docket No. 59, Breeden Decl., Ex. 14, p. 3. Importantly, that representation lead to the Arbitrator finding against the *defendants*, not just GN.

only if the trier of fact determines that the violation was “willful.” Va.Code Ann. § 59.1-204(A).

2011 WL 1363992, at *3.

Although Virginia Code Section 59.1-204(A) includes a list of regulatory infractions that might not necessarily be considered fraudulent in nature (e.g., violations of the Virginia Health Club Act, or violations of the Virginia Home Solicitation Sales Act), the provisions of Chapter 15 of the Motor Vehicle Code (Va. Code § 46.2-1500, *et seq.*) are not among the enumerated statutes. In fact, there is an exclusion in Section 59.1-204(A)(16a) (failure to disclose all conditions, charges or fees) for “a transaction for the sale or lease of motor vehicles, farm tractors or motorcycles as defined in § 46.2-100.” Thus, the Arbitrator’s Award in this case, insofar as it was based on violations of the VCPA, could only have been based on the deception, fraud or fraudulent misrepresentations portions of Section 59.1-204(A). These fraud-based provisions, as Judge Mitchell noted, are essentially the same as the fraud required for a finding of non-dischargeability under Section 523(a)(2)(A).

The Court, finds, therefore, that the Arbitration Award is entitled to collateral estoppel because Mr. Touma was in privity with GN and the award was based on actual fraud and the VCPA.⁴

II. The Spoliation Issue.

The Plaintiff argues, in the alternative, that the failure of a Dealer Operator to retain records pursuant to Va. Code § 46.2-1500 gives rise to a spoliation claim and that, therefore, the

⁴ The parties, no doubt, will note the difference in the results between this Adversary Proceeding and the *Fasusi* Adversary Proceeding. The salient differences between the two cases are: (a) in *Fasusi*, the Arbitrator used the term “dealer” (singular), whereas in this case the Arbitrator used the term “Defendants” (plural, which could only have referred to GN and Mr. Touma); and (b) the Arbitrator in *Fasusi* based the award on findings that “the dealer made a fraudulent misrepresentation and that the dealer did not comply with Virginia Code Section 46.2-1530,” and in this case the Award was based on fraudulent misrepresentations and violations of the VCPA.

Defendant is estopped to deny liability. Spoliation is defined as “the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Stevens & Son, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 103 (E.D. Va. 2018). It is not clear to the Court whether the Plaintiff relies on Federal Rule of Civil Procedure 37(e), relating to electronically stored information (ESI), but both Rule 37(e) and the case law relating to spoliation require an element of willfulness, as well as a showing of prejudice to the moving party. *Silvestri*, 271 F.3d at 590 (“a court must find some degree of fault to impose sanctions”); *Trigon Ins. Co. v. U.S.* 204 F.R.D. 277, 288 (E.D. Va. 2001) (“Given the rationale for, and the policy behind, the rule against spoliation, assessment of sanctions depends most significantly on the blameworthiness of the offending party and the prejudice suffered by the opposing party.”)⁵

The Court need not address the spoliation issue in this case because it is granting summary judgment to the Plaintiff on the grounds of collateral estoppel, above.

Conclusion

For the foregoing reasons, the Court will enter a separate Order under which:

- A. The Court will grant the Plaintiff’s Motion.
- B. The Court will deny the Defendant’s Motion.
- C. The Court will enter a Judgment declaring the Arbitration Award in this case to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

⁵ Notably, the Plaintiff did not bring a claim in the Defendant’s bankruptcy case to deny the Defendant a discharge based on Bankruptcy Code Section 727(a)(3) (the failure to keep or preserve business records of the debtor or an affiliate).

D. The Court will grant the Plaintiff relief from the automatic stay to confirm the Arbitration Award in the state court and to commence collection proceedings on the Judgment, other than against any property that is property of the bankruptcy estate.⁶

E. The Clerk will mail these Findings and the accompanying final Order, or will provide cm-ecf notice of their entry, to the parties below.

Date: Jun 29 2020

Alexandria, Virginia

/s/ Brian F. Kenney

Brian F. Kenney
United States Bankruptcy Judge

Entered on Docket: June 30, 2020

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⁶ In the Court's Order granting the Defendant's Motion to Dismiss in part and denying the Motion in part, the Court granted the Motion as to Count I (Confirmation of Arbitration Award), but held that "[t]he Motion to Dismiss is granted as to Count I without prejudice to confirmation of the award in State Court in the event that the Plaintiff's debt is determined to be nondischargeable." Docket No. 38, p. 7.

Courtney,
Plaintiff

Touma,
Defendant

Adv. Proc. No. 19-01123-BKF

CERTIFICATE OF NOTICE

District/off: 0422-9

User: douglasse
Form ID: pdford9

Page 1 of 1
Total Noticed: 1

Date Rcvd: Jun 30, 2020

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Jul 02, 2020.

dft +Gaby A Touma, 47374 Westwood Place, Sterling, VA 20165-2411

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****

NONE. TOTAL: 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

Transmission times for electronic delivery are Eastern Time zone.

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 309): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Jul 02, 2020

Signature: /s/Joseph Speetjens

CM/ECF NOTICE OF ELECTRONIC FILING

The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on June 30, 2020 at the address(es) listed below:

Jacqueline Audrey Kramer on behalf of Defendant Gaby A Touma jkramer@westlakelegal.com
Thomas K. Plofchan, Jr. on behalf of Defendant Gaby A Touma tplofchan@westlakelegal.com,
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TOTAL: 3